

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

MAY 28 2003

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations)

(Shawnee and Topeka, Kansas))

MB Docket No. 03-26

RM - 10638

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYTo: Assistant Chief, Audio Division
Media Bureau**OPPOSITION TO MOTION TO STRIKE**

Allur-Kansas City, Inc. ("Allur") hereby opposes the "Motion to Strike" filed by Cumulus Licensing Corp. ("Cumulus") on May 13, 2003 by which Cumulus seeks to strike from the record of this proceeding Allur's informal letter comments, filed on May 1, 2003 ("Allur Letter"). Cumulus's Motion is without merit, and should be denied.

Allur filed its informal letter comments in this proceeding to bring to the Bureau's attention certain facts concerning the Cumulus re-allotment proposal. In particular, although Cumulus's rulemaking petition expresses a desire to provide Shawnee, Kansas with its first local radio service, Cumulus's various proposals focused on relocating its transmitter make evident that it is more interested in the advantages of having its transmitter in a particular area than it is in providing service to either Topeka or Shawnee. *See* Allur Letter at 1-2. Given this evidence, it is particularly important that the Commission evaluate whether a re-allotment of the KMAJ channel 299 from Topeka to Shawnee would actually serve the public interest. To this end, Allur sought to correct

No. of Copies rec'd 017
List ABCDE

the record, in which Cumulus had erroneously contended that it was not required to make a *Tuck* showing to demonstrate, among other things, that Shawnee is a community independent from Kansas City. *See* Allur Letter at 2-3.¹

Rather than acknowledge its misstatement of the law, Cumulus seeks to have Allur's brief letter comments stricken from the record on spurious procedural grounds, arguing that Allur was required under Commission rules to submit "a separate motion to accept a late filed pleading." Motion at 1. In fact, Section 1.415(d) of the Commission's rules states simply that no comments may be filed in rulemaking proceedings after the deadlines have passed "unless specifically requested or authorized by the Commission." 47 C.F.R. § 1.415(d). Allur acknowledges this restriction in the first paragraph of its letter, noting the passage of the comment deadlines in this docket, and specifically requests that the Bureau accept and consider its letter in order that it have the benefit of "all relevant facts relating to [the] allotment proposal." Allur Letter at 1. Accordingly, Allur complied with the rule by expressly asking the Bureau to accept its informal comments.

The Bureau has typically required a motion for acceptance only where a late-filed *pleading* has been submitted, and acceptance of the post-cycle comments would prejudice the procedural rights of the petitioner, *e.g.*, in the case of a counterproposal seeking an arrangement of allotments different from the petitioner's plan.² This is not such a circumstance. Indeed, contrary to Cumulus's assertions (Motion at 2 (¶ 2)), Allur

¹ Contrary to Cumulus's assertion, whether "Cumulus has provided a compelling showing of Shawnee's independence" (Motion at 2) is a matter that remains to be determined in this proceeding, and upon which Allur has offered no opinion.

² *See* *Madisonville, College Station, Giddings, Bay City, Columbus, Edna, Garwood, Palacios and Sheridan, Texas*, 18 FCC Rcd 640, 641 n.7 (Aud. Div. 2003), cited in Motion at 1 n.1.

does not request any specific relief via its letter. Instead, it simply seeks to correct an error in the record, and to encourage the Bureau to give full scrutiny to Cumulus's *Tuck* showing. It is appropriate for the Bureau to accept the letter in the interest of having a complete record, as it has typically done in similar circumstances.³ Moreover, inasmuch as the letter comments were submitted informally, simply to bring particular facts to the Bureau's attention, Section 1.419(b) of the Commission's rules provides a second, independent basis upon which to consider the letter, for which no specific Commission authorization is required. *See* 47 C.F.R. § 1.419(b).⁴

Particular scrutiny of Cumulus's proposal is appropriate in light of the petitioner's changing justifications for permission to operate from its requested site, and its evident interest in ultimately re-locating to some as-yet-unidentified site under color of a new Shawnee allotment. On the same day that it filed its Motion, Cumulus also filed Reply comments concerning Allur's pending KMJK(FM) application, which protects the allotment coordinates specified in this docket. In that filing, Cumulus identifies itself as a "potential applicant" for facilities that would conflict with Allur's pending proposal for Station KMJK.⁵ Allur's inferences about Cumulus's ultimate goals are therefore not "pure speculation," as Cumulus claims (Motion at 2), but are confirmed in Cumulus's

³ *See, e.g., Wallace, Idaho and Lolo, Montana*, 14 FCC Rcd 21110 n.1 (Alloc. Br. 1999) ("While acceptance of late-filed comments is not contemplated by our Rule Sec. 1.415(d) unless specifically requested or authorized by the Commission, which was not done here, we will, however, accept Sunbrook's comments in the interest of promoting the resolution of this case on the basis of an enhanced record.")

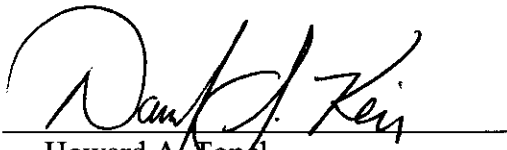
⁴ *See also, e.g., Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 13 FCC Rcd 14462, 14475 n.72 (1998)

⁵ *See* Reply to Opposition, File No. BPH-20030324ADA, at 3. Cumulus has the "potential" to be such an applicant only if it secures the allotment change at issue in this proceeding.

own filings, where it explicitly anticipates the possibility of operating from a site that would conflict with Allur's pending KMJK application.

Accordingly, the Bureau should deny Cumulus's baseless Motion to Strike, and consider Allur's letter comments, ensuring that whatever action is ultimately taken in this docket is based on a complete record, and is consistent with the public interest.

ALLUR-KANSAS CITY, INC.

By: 
Howard A. Topel
David S. Keir

Leventhal Senter & Lerman PLLC
2000 K Street, N.W, Suite 600
Washington, D.C. 20006
(202) 429-8970

May 28, 2003

Its Attorneys

CERTIFICATE OF SERVICE

I, Sharon Krantzman, hereby certify that a true and correct copy of the foregoing Opposition to Motion to Strike was sent by first-class, postage prepaid mail this 28th day of May, 2003, to the following:

Mark N. Lipp, Esquire
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW
Washington, DC 20004

*Deborah A. Dupont, Esquire
Media Bureau
Federal Communications Commission
Room 2-A834
445 12th Street, SW
Washington, DC 20554


Sharon Krantzman

* By Hand Delivery